

In the Supreme Court of the United States**OCTOBER TERM, 1977****No. 77-808**

KANSAS CITY AREA TRANSPORTATION AUTHORITY
OF THE KANSAS CITY AREA TRANSPORTATION
DISTRICT,
Petitioner,

VS.

JAMES G. ASHLEY, JR. and OLIVE J. ASHLEY,
Individually and as Executrix of the ESTATE OF
JAMES G. ASHLEY, SR. d/b/a KANSAS CITY
PUBLIC SERVICE FREIGHT OPERATION,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF MISSOURI EN BANC

RESPONDENTS' BRIEF

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RESPONDENTS' BRIEF**STATEMENT**

Petitioner misstates, in its Petition for Writ of Certiorari to the Missouri Supreme Court en banc, the action of that Court and prays that a review be granted by this Court on grounds foreign to the opinion and ruling of the Supreme Court of Missouri in an effort to seek

a reversal here. The Petitioner ignores a previous precedent opinion of the Missouri Supreme Court and misstates its statutory authority of eminent domain as it relates to the taking of the property of an existing railroad which is a public utility. The Missouri Court of Appeals, Kansas City District, heard this case on appeal from a trial to a condemnation jury and rendered its opinion. That opinion is not reported but is included in Petitioner's Petition as Appendix B. The Missouri Supreme Court, *en banc*, in its review of this case, adopted one argument of the Respondents that challenged the Petitioner's right to condemn the railroad right of way of the Respondents as a matter of law, that the Missouri Court of Appeals, Kansas City District, did not address in its opinion on appeal. The Petitioner pleads that, because the joint act of the legislatures of the States of Missouri and Kansas establishing this Transportation Authority, consented to by the Congress of the United States, exempts this Petitioner from the jurisdiction of the Interstate Commerce Commission, it likewise exempts everything else over which the Petitioner seeks to exercise dominion. The Petitioner infers that those powers found in the Statutes of Missouri and Kansas and the Public Law enacted by the Congress of the United States gives the Petitioner a power greater than that of the sovereign power of the United States.

OPINIONS BELOW

The opinion of the Supreme Court of Missouri, *en banc*, included in the Petitioner's Petition as Appendix A, is reported at 555 SW2d 9. The opinion of the Missouri Court of Appeals, Kansas City District, Appendix B, is not reported.

QUESTIONS PRESENTED

1. Whether or not the Class II Freight Switching and Terminal Railroad, operating under a Certificate of Public Convenience and Necessity, granted by the Interstate Commerce Commission, and regulated by that Commission in accordance with 49 U.S.C., by the Respondents is subject to eminent domain proceedings in any court action against that railroad to take the railroad in its entirety.
2. Whether the Petitioner, declared by the Supreme Court of Missouri, not to be a political subdivision, has the superior power of eminent domain over any other public utility, when the Revised Statutes of Missouri, Sec. 238.010, declares that their authority to condemn, "shall follow the procedure provided by the laws of Missouri for the appropriation of land or other property taken for telegraph, telephone or railroad right of ways."
3. Whether the opinion of the Missouri Supreme Court, *en banc*, by its mention of 49 U.S.C. Sec. 1a(10) "interprets" the legal intent and meaning of such section of the Interstate Commerce Law.

STATEMENT OF THE CASE

The Statement of the Case as found in the brief of the Petitioner is correct in most instances; however, they do take poetic license in other areas and recite incorrect conclusions of the Law of Missouri. The Statement is also incomplete in reciting the history of this action by this Petitioner against this Respondent. The Respondent, endeavoring not to be repetitive, will supplement the Statement of the Petitioner.

The action by the Petitioner against the Respondents to take their Class II Railroad began in the State Court of Missouri. The authority of the Petitioner to maintain the action against the Respondents was immediately challenged in the trial court by motions to dismiss the petition on various grounds, including the ground upon which the Supreme Court of Missouri, *en banc*, ruled. When the efforts of the Respondents were not successful in the trial court, the Respondents then went to the United States Courts, asking for declarative relief on the grounds denied by the State Court to avoid a costly jury trial. The complaint of the Respondents was dismissed by the United States District Court for the Western District of Missouri on motion by the Petitioner here. An appeal was taken from the ruling of the United States District Court to the United States Court of Appeals, Eighth Circuit, No. 75-1743, who entered their opinion, which is not reported, on April 1, 1976. The Court of Appeals decision is included as Appendix 1. In that proceeding the Petitioner here asserted that there was no federal question involved to give the Federal Court system jurisdiction of the subject matter. The Petitioner's authority cited in its first point of Argument in the Court of Appeals cited 2 *Moore's Federal Practice*, #2.07; *Lock Joint Pipe Company v. Anderson*, (W.D.Mo., 1955) 127 F.Supp. 692 and *Haley v. Childers*, (8th Cir., 1963) 314 F2d 610. They now take a position 180 degrees from that direction.

As the opinion of the United States Circuit Court of Appeals states, the State court proceeding had been decided in favor of the Respondents and the Court of Appeals adopted the opinion and decision of the Western District of Missouri that agreed with the Petitioner here, that there was no federal jurisdiction involved.

The Respondents maintained their position that the Petitioner did not have a right to condemn their railroad. The State Courts of Missouri agreed with the Respondents and entered a dismissal. In their opinions, these courts never suggested that the Interstate Commerce Act preempted any act of Congress. The state courts consistently stated that the powers of the Petitioner were spelled out in the legislative acts of the States which were consented to by the Congress of the United States and that the Congress of the United States, in enacting Public Law 89-599, contained a specific limitation (Sec. 2(b)) and that the Petitioner here could not maintain eminent domain over the property of the Respondents.

In their rulings, the Missouri Court of Appeals decided the issues on the basic premise of Missouri eminent domain law and the power given the Petitioner, which they clearly stated did not include maintaining this cause of action against the Respondents. The Missouri Supreme Court chose not to decide the issues on the basis of the Missouri Court of Appeals, but recognized the regulatory authority of the Interstate Commerce Commission as it relates to railroads. The Missouri Supreme Court made no statement in its opinion that the Petitioner was regulated by, or subject to, the Interstate Commerce Act; but that the Respondent Railroad here was so regulated and controlled. The State Courts of Missouri, then, made their rulings clear and concise and on different grounds and it would appear that this Petition for Writ of Certiorari is solely because of an adverse decision and not because of any conflict or difference of opinions between State Courts.

ARGUMENT

I.

Whether or not the Class II Freight Switching and Terminal Railroad, operating under a Certificate of Public Convenience and Necessity, granted by the Interstate Commerce Commission, and regulated by that Commission in accordance with 49 U.S.C., by Respondents is subject to eminent domain proceedings in any court action against that railroad to take the railroad in its entirety.

It has never been disputed that Respondents are a Class II railroad, switching and terminal. The Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission was admitted into evidence (R. 141, 143). Title 49, U.S.C.A., Sec. 1(18) of the Interstate Commerce Act states:

"No carrier by railroad subject to this chapter shall . . . abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment." (emphasis supplied)

The power of eminent domain is granted by legislative enactment and is strictly construed in its application. The Government of the United States, in providing for the general welfare of its citizens, has seen fit to enact a law to regulate and control, in the public interest, railroads. Title 49 U.S.C.A. regulates carriers by railroad and the section quoted above is not subject to any mis-

understanding, for it is stated quite clearly that before there can be any change in, "all or any portion of a line of railroad," the Interstate Commerce Commission must issue its permit in the interest of public convenience and necessity. This section of the Interstate Commerce Act does not, nor does any section, yield to any eminent domain statute. If this was not so restricted and limited, the public convenience and necessity that this Act must protect would be subject to monopolistic takings based upon the financial position of the condemnor.

In its Petition for Writ of Certiorari here, Petitioner states in its brief, p. 8, that, "This was the first instance in this case where a court had specifically ruled that the Interstate Commerce Act preempted Public Law 89-599." This statement has to be total fantasy. The Supreme Court of Missouri made no such conclusion or ruling. Public Law 89-599 "preempts," using the verbiage of the Petitioner, the Petitioner from acting in any manner that invades previously established authority legislated by the United States. The preamble to Public Law 89-599 (Appendix C, p. A 21) makes this clear as it states:

". . . Subject to the provisions of Section 2 of this Act, . . .

"Sec. 2 (b) Nothing in such compact shall be construed to affect, impair, or diminish any right, power, or jurisdiction of the United States or of any court, department, bureau, officer or official of the United States, in, over, or in regard to the territory which is embraced in the Kansas City Area Transportation District, as defined in such compact, or any navigable waters, or any commerce between the States or with foreign countries, or any bridge, railroad, highway, pier, wharf, . . ."

This limitation found in Public Law 89-599 specifically states that the Petitioner cannot bother any thing over which the Congress of the United States has legislated right, power or jurisdiction. The Petitioner takes the position that, because of a right of eminent domain granted them, limited and strictly construed as it is and must be, they can ignore this legislative limitation. In this assumption, the Petitioner feels and believes that the Congress of the United States and the States of Missouri and Kansas gave them greater power than that of the United States, which is not true.

II.

Whether the Petitioner, declared by the Supreme Court of Missouri not to be a political subdivision, has the superior power of eminent domain over any other public utility, when the Revised Statutes of Missouri, Sec. 238.010, declares that their authority to condemn, "shall follow the procedure provided by the laws of Missouri for the appropriation of land or other property taken for telegraph, telephone or railroad right of ways."

The Petitioner's authority to exercise eminent domain is not as all-encompassing as they want this Court to believe. The Supreme Court of Missouri has declared that the Petitioner is not a political subdivision in *Kansas City Area Transportation Authority v. James G. Ashley, Sr., et al.*, 478 SW2d 323, 324 (Mo. Sup. 1972):

"We do not see in the statute creating the Kansas City Area Transportation Authority such a delegation of governmental functions as would constitute that agency a governmental unit . . ."

If the Kansas City Area Transportation Authority is not a political subdivision, then it is nothing more than a public utility.

The Missouri Statute 238.010 R.S.Mo. that established this Transportation Authority clearly grants the right of eminent domain to them but states that, if that right is exercised in Missouri, "the said Authority shall follow the procedure provided by the Laws of the State of Missouri for the appropriation of land or other property taken for telegraph, telephone or railroad right of ways." (Art. III (9)), which authority is no greater than any other public utility in the State of Missouri. There can be no inference of a superior power of eminent domain with the clarity contained in the Law and in the Supreme Court of Missouri's interpretation of that Law.

In *Kansas City v. Ashley*, 406 SW2d 584, 588 (Mo. Sup. 1966) the Court said:

"In making the argument appellant recognizes the exception when the condemnor seeks 'to devote same to a conflicting or inconsistent use.' The general rule is stated in 29A C.J.S. Eminent Domain, Sec. 74, page 326: ' . . . property already devoted to a public use cannot be taken for another public use which will totally destroy or materially impair or interfere with the former use, unless the intention of the legislature that it should be so taken has been manifested in express terms or by necessary implication, mere general authority to exercise the power of eminent domain being in such case insufficient,' and this rule has been held to apply except 'where the power of eminent domain is being exercised by the sovereign itself, such as the state or federal government, . . . rather than by a . . . municipality.' *State ex rel. State Highway Commission v. Hoester*, Missouri, 362 SW2d 519, 522

(2, 3). This rule has been applied in respect to taking a railroad for a street, e.g. . . . a power to appropriate the property of the railroad in such a manner as to destroy or greatly injure its franchise, or render it impossible or very difficult to prosecute the object of the organization,' could not be inferred. *City of Hannibal v. Hannibal & St. Joseph Railroad Co.*, 49 Mo. 480, 481."

Obviously the contended superior power of eminent domain by the Petitioner is without basis in the statutes or anywhere else.

III.

Whether the opinion of the Missouri Supreme Court, en banc, by its mention of 49 U.S.C. Sec. 1a(10) "interprets" the legal intent and meaning of such section of the Interstate Commerce Law.

The matter of the noted section in the Interstate Commerce Act is included in the opinion of the Missouri Supreme Court. Nowhere in the opinion does that Court take upon itself to rule on the merits of something relating to this case that might appear before that Commission. The Missouri Supreme Court adopted the Respondents first point of error made no appeal in the State court when the Respondents charged that the trial court erred as to jurisdiction over the subject matter. It is true that the learned judge of the Supreme Court writing the opinion commented on some of the phases that might take place and some of the matters that it might include, but a careful look at that opinion and one will readily recognize that it is devoid of quotable authority and thus not likely for use under the doctrine of *stare decisis*. The Petitioner has included this dramatic issue in its Petition for Writ of Certiorari, hopefully to

gain the attention of this Court in an effort to override the decision in the State Court. There is no interpretation by the Supreme Court of Missouri of 49 U.S.C. 1a(10) and, therefore, nothing for this court to review.

CONCLUSION

The Petitioner asks this court to review this case, stating many things that are nothing more than enticements. They speak of "ATA's Dilemma" and they quote Mr. Justice Frankfurter regarding that this Court must have final power to pass upon the meaning and validity of compacts, etc. All of this is very nice; however, the Petitioner here wants to take the property of the Respondents in a manner that is contrary to the Law of the United States and contrary to the Law of Missouri and the Missouri State Courts, who this Petitioner said unequivocally should rule on it, have thoroughly reviewed this and have ruled. There is no challenge as to the validity of the compact of the states and this "twentieth century urban transportation problem" does not abrogate the constitutional rights of private citizens just because some uncontrolled, unregulated, tax-supported transportation system says that they are greater than the laws of the United States.

The Respondents respectfully urge this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX 1

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 75-1743

James G. Ashley, Jr., and Olive J. Ashley, Partners,
d/b/a Kansas City Public Service
Freight Operation,
Appellants,

v.

Kansas City Area Transportation
Authority,
Appellee.

Appeal From the United States District Court
for the Western District of Missouri

Submitted: March 11, 1976

Filed: April 1, 1976

Before LAY, ROSS and STEPHENSON, Circuit Judges.

PER CURIAM.

In April 1970, the Kansas City Area Transportation Authority (ATA) instituted condemnation proceedings in Missouri state court against the Class II railroad owned by the Ashleys. In their answer, the Ashleys asserted, *inter*

alia, that under federal law the ATA was not authorized to condemn the railroad.¹

In December 1972, the Ashleys sought declaratory and injunctive relief in federal district court in a similar attempt to prohibit the ATA from maintaining the state condemnation proceeding against the railroad. The district court, the Honorable Elmo B. Hunter presiding, dismissed the action for lack of subject matter jurisdiction, finding that the federal question Ashleys asserted was rather a **federal question defense to the state court condemnation action**. *See Chandler v. O'Bryan*, 445 F.2d 1045, 1055 (10th Cir. 1971), cert. denied, 405 U.S. 964 (1972). This appeal followed.

We affirm the dismissal on the basis of the district court's opinion.

Judgment affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals,
Eighth Circuit.

[Not to be published].

1. At oral argument the parties informed the court that the state case has now been decided by the Missouri Court of Appeals in the Ashleys' favor under state law; the ATA has applied for discretionary transfer to the Missouri Supreme Court.